NO: FST CV 15 5015035S	:	SUPERIOR COURT
GIRL DOE, PPA MOTHER DOE, ET AL.	:	J.D. OF STAMFORD
v.	:	AT STAMFORD
TOWN OF WILTON, ET AL	:	APRIL 14, 2017

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Practice Book § 11-10, the Defendants Town of Wilton ("Town") and Wilton Board of Education ("BOE") hereby submit this reply in support of their Motion for Summary Judgment dated March 1, 2017.

I. Mr. Von Kohorn's Arrest Should Not Be Considered By The Court, As That Information Has No Bearing On The Defendants' Duty To The Plaintiffs At The Time Of The January 2013 Incident And Investigation.

The Court should not consider the fact of Mr. Von Kohorn's arrest in deciding the defendants' Motion for Summary Judgment. The conduct that forms the basis of the plaintiffs' causes of action occurred in December of 2012, January of 2013, and fall of the 2013-2014 school year. **See, Amended Complaint, Count One**. Mr. Von Kohorn was not arrested until August 2014, approximately a year and a half after the January 2013 report to Dr. Rapczynski. The arrest has no bearing on the Court's consideration of the instant motion and the causes of action alleged in the Amended Complaint.

The counts against the BOE sound in negligence, and a determination of duty is integral to an analysis of such claims. Jaworski v. Kiernan, 241 Conn. 399, 404 (1997). "[T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, *knowing what the defendant knew or should have known*, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case...." Murdock v. Croughwell, 268 Conn. 559, 566 (2004) (quoting Ryan Transp., Inc. v. M & G Associates, 266 Conn. 520, 525–26

ORAL ARGUMENT IS REQUESTED
TESTIMONY IS NOT REQUIRED

(2003)) (emphasis added). There is no possible way that the defendants or their agents could have known of Mr. Von Kohorn's future arrest, and thus is it not relevant to the determination of the BOE's duty to the plaintiffs.

II. Mr. Von Kohorn's Statement That He Informed Another Miller-Driscoll Staff Member That He Was Taking Girl Doe To The Bathroom Is Inadmissible.

"Only evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment." (Internal quotation marks omitted.) Great Country Bank v. Pastore, 241 Conn. 423, 436, 696 A.2d 1254 (1997). The Code of Evidence § 8-2 prohibits the admission of hearsay except as permitted in the Code, General Statutes, or the Practice Book. Axiomatically, "'[h]earsay' means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence *to establish the truth of the matter asserted*." Conn. Code Evid. § 8-1 (emphasis added). If evidence contains hearsay within hearsay, then each part must be independently admissible under a hearsay exception. Conn. Code Evid. § 8-7. While the defendants do not contest the admissibility of Dr. Rapczynski's January 8, 2013 DCF report at this stage of the litigation, Mr. Von Kohorn's statement, made to Dr. Rapczynski and contained in the DCF report, that he told another staff member he was taking Girl Doe into the bathroom, does not fall within any hearsay exception. That statement, which the plaintiffs offer to prove the truth of the matter asserted therein — that other staff members *knew* Mr. Von Kohorn was taking Girl Doe alone to the bathroom — is inadmissible hearsay and should not be considered by the Court in deciding this motion.

III. All Acts Performed By The Agents Of The Wilton Board Of Education Were Either Discretionary, Or Alternatively Were Ministerial And Not Misperformed.

In their brief in opposition, plaintiffs identify the acts that they allege violate the BOE's duty to the plaintiffs.

> "Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder ... there are cases

> where it is apparent from the complaint ... [that] [t]he determination of whether an act or omission is discretionary in nature and, thus, whether governmental immunity may be successfully invoked pursuant to ... § 52–557n(a)(2)(B),8 turns on the character of the act or omission complained of in the complaint.... Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions necessarily involved the exercise of judgment, and thus, necessarily were discretionary in nature, summary judgment is proper."

Bonington v. Town of Westport, 297 Conn. 297, 307–08 (2010) (quoting Swanson v. Groton, 116 Conn. App. 849, 854, 977 A.2d 738 (2009)). Here, it is apparent from the complaint that some acts involved are ministerial, some are discretionary as a matter of law, and others are discretionary based on the uncontested facts.

Each act is analyzed below.

a. The Determination Of Whether There Was "Reasonable Cause To Suspect Or Believe That A Child Under The Age Of 18 Has Been Abused" Involves The Exercise Of The Reporter's Discretion, And The Ministerial Duty To Report Was Not Triggered Based On The Information Provided To Dr. Rapczynski As Of January 3, 2014.

Conn. Gen. Stat. § 17a-101a provides that "[a]ny mandated reporter, as described in section 17a-101, who in the ordinary course of such person's employment or profession has reasonable cause to suspect or believe that any child under the age of eighteen years (A) has been abused or neglected… shall report or cause a report to be made in accordance with the provisions of sections 17a-101b to 17a-101d, inclusive." Ours courts hold that, although the duty to report is mandatory, reporters must still exercise judgment and discretion. "The legislature, therefore, has expressed its desire that reporters use good *judgment* in reporting suspected abuse or neglect.." Ward v. Greene, 267 Conn. 539, 559–60 (2004) (emphasis added). The Supreme Court goes on to explain that, "[e]ssentially, the agencies rely on mandated reporters to filter allegations that cannot be substantiated, which enables the agencies to focus their limited resources on reports that demand immediate attention." Ward v. Greene, 267 Conn. 539, 560 (2004). As of January 3, 2013, Dr. Rapczynski's interviews with Mr. Von Kohorn; Ms. Neville, who was Girl Doe's teacher; and Ms. Blair, who was Mr. Von Kohorn's supervising teacher,

demonstrated that there had been no opportunity for Mr. Von Kohorn to assault Girl Doe — i.e. the allegations were not substantiated.

A mandated reporter has discretion in making his or her determination about the existence of reasonable cause to suspect that a child has been abused. Ward v. Greene, 267 Conn. 539, 559–60 (2004); Doe v. Hartford Bd. of Educ., No. CV146049842S, 2016 WL 5798794, at *3. The mandatory duty to report is triggered only when the reporter determines, in his or her discretion, that there exists reasonable cause to suspect a child has been abused. Based on the information he had received, Dr. Rapczynski did not find that he had reasonable cause to suspect abuse had occurred. **See, First Deposition of Fred Rapczynski, at 76:19—77:7; 80:16—81:6, attached as Exhibit A.**

Dr. Rapczynski's determination as to whether there was reasonable cause to suspect child abuse was therefore a discretionary act, protected by both governmental immunity and the provisions of Conn. Gen. Stat. § 17a-101e.

b. There Is No Admissible Evidence That Any Staff Member Knew About Or Failed To Prevent A Violation Of The Wilton Preschool Toileting Policy.

As discussed above, the statement from Mr. Von Kohorn "indicat[ing] that he had told another staff member that he was taking [Girl Doe] to the bathroom," is inadmissible hearsay and cannot be used in deciding this motion. Great Country Bank v. Pastore, 241 Conn. 423, 436, 696 A.2d 1254 (1997). It is also worth noting that Dr. Rapczynski interviewed that teacher who Mr. Von Kohorn claimed to have informed, and she told Dr. Rapczynski that she did not recall that occurring; Dr. Rapczynski concluded that Mr. Von Kohorn had not informed that staff member, and his report notes that Mr. Von Kohorn's claim "could not be [corroborated]." **See, Plaintiffs' Exhibit 3, attached as Exhibit B.**

The sole remaining piece of evidence on which the plaintiffs rest their argument that other staff members knew Mr. Von Kohorn was taking Girl Doe to the bathroom in violation of the Wilton Preschool Toileting Policy is Dr. Rapczynski's cherry-picked admission that when the preschool students are getting dropped off, the area near the bathroom where

the incident occurred is a busy area. **See, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, at 6; Second Deposition of Fred Rapczynski, at 261:18—262:12, attached as Exhibit C**. This ignores Dr. Rapczynski's testimony that "there is a brief period of time where the majority of the staff are outside and nobody in the actual program area." **See, Second Deposition of Fred Rapczynski, at 263:21—264:2, attached as Exhibit C**. He also testified that Mr. Von Kohorn would have been aware of that moment when few people would be in the area. **See, Second Deposition of Fred Rapczynski, at 264:12—264:18, attached as Exhibit C.**

> "It is not enough that one opposing a motion for a summary judgment claims that there is a genuine issue of material fact; some evidence showing the existence of such an issue must be presented in the counter affidavit.... Further, [i]t is not enough ... merely to assert the existence of such a disputed issue ... [instead] the genuine issue aspect requires the party to bring forward before trial evidentiary facts, or substantial evidence outside of the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred.... Mere statements of legal conclusions or that an issue of fact does exist are not sufficient to raise the issue."

Gianetti v. Anthem Blue Cross & Blue Shield of Connecticut, 111 Conn. App. 68, 75 (2008) (quoting Wadia Enterprises, Inc. v. Hirschfeld, 27 Conn.App. 162, 168–69, 604 A.2d 1339, aff'd, 224 Conn. 240, 618 A.2d 506 (1992)). Here, the plaintiffs have been unable to present any evidence admissible at trial showing that any other staff member had knowledge of Mr. Von Kohorn's impending violation of the Wilton Preschool Toileting Policy. In the absence of such evidence, the undisputed facts demonstrate that there has been no violation of the Wilton Preschool staff members' ministerial duty for to follow and enforce the toileting policy.

c. The Duty To Communicate With Parents Of Preschool Students Is Discretionary.

In support of their claim that Dr. Rapczynski had a ministerial duty to report to Girl Doe's family about Mr. Von Kohorn's admission that he took Girl Doe alone into the bathroom, plaintiffs' rely solely on the testimony of Dr. Kevin Smith, the current superintendent of the Wilton Public Schools, who testified that Dr. Rapczynski had a non-discretionary obligation

to do so. **See, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, at 21.** However, Dr. Smith is not competent to testify as to the policies in the Wilton Public Schools in January 2013 — he has only been the Superintendent of the Wilton Public Schools since July 1, 2014. **See, First Deposition of Kevin Smith, at 10:17—11:11, attached as Exhibit D**. In January of 2013, Dr. Smith was the superintendent of schools in Bethel, Connecticut. **See, First Deposition of Kevin Smith, at 11:21—11:25, 204:19—204:23, attached as Exhibit D**. In Connecticut, "it is well established that '[a] person who has no personal knowledge concerning facts about which he or she is asked to testify is not competent to testify about these facts.'" State v. Sunrise Herbal Remedies, Inc., 296 Conn. 556, 572 (2010). "[S]ources indicate that the touchstone of competence is personal knowledge. 'Personal knowledge' is variously described as knowledge acquired firsthand or from observation. See Black's Law Dictionary (9th Ed. 2009); 1 C. McCormick, supra, § 10, at p. 47. Black's Law Dictionary (9th Ed. 2009) defines 'personal knowledge' as '[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' See also Ballentine's Law Dictionary (3d Ed. 1969)." State v. Sunrise Herbal Remedies, Inc., 296 Conn. 556, 573 (2010).

This fundamental basis for evidence is further supported by the Practice Book § 17-46, which requires that affidavits in support or opposition to a motion for summary judgment be made on personal knowledge.

Dr. Smith has no personal knowledge of the policies in effect as of January 2013. **See, First Deposition of Kevin Smith, at 131:1—131:9; 213:8—214:23, attached as Exhibit D**. Consequently, his testimony cannot be used to establish a non-discretionary duty in communicating with the parents of students.

Case law suggests the opposite — communication with the parents of school children is discretionary, as a matter of law. Absent evidence of a policy or directive mandating the manner in which the principal must communicate with parents, the Court

will find that the government and its agents were engaged in duties that required the exercise of discretion. Martel v. Metro. Dist. Comm'n, 275 Conn. 38, 50 (2005). Even where there is a school policy relating to the particular conduct at issue, our courts will still find a ministerial duty in the absence of any allegations that "the defendants failed to perform any *specified* duties in any *prescribed* manner." Dornfried v. Berlin Bd. of Educ., No. CV064011497S, 2008 WL 5220639, at *5 (emphasis in original). Recently, our Appellate Court held that, "[i]n order to create a ministerial act, there *must* be a city charter, provision, ordinance, regulation, rule, policy, or any other directive [compelling a municipal employee] to [act] in any prescribed manner." Texidor v. Thibedeau, 163 Conn. App. 847, 857 (2016) (quoting Coley v. Hartford, 140 Conn.App. 315, 323, 59 A.3d 811 (2013), aff'd, 312 Conn. 150, 95 A.3d 480 (2014)) (emphasis added). Here, there is no evidence other than Dr. Smith's (inadmissible) statements that there was any ministerial duty at the time of the events in the Amended Complaint. In the absence of such evidence, Dr. Rapczynski's acts were discretionary and protected by governmental immunity.

IV. Girl Doe Was Not An Identifiable Victim.

a. *The Harm To Girl Doe Was Not Apparent To Any Wilton Public School Employee On December 21, 2013.*

Plaintiffs acknowledge in their brief that, in order to invoke the identifiable person-imminent harm exception, our jurisprudence requires that there must be a public official who knows of the hazard. "This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.... All three must be proven in order for the exception to apply." Haynes v. City of Middletown, 314 Conn. 303, 312–13 (2014); **See, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, at 24.** Without conceding the first two elements of the exception, as established above, there is no admissible evidence that any Wilton Public School employee witnessed Mr. Von Kohorn taking Girl Doe into the bathroom.

b. Girl Doe Was Not An Identifiable Victim Subject To Imminent Harm In Late Autumn Of 2013.

In late autumn or early winter of 2013, the staffing needs of the preschool changed, and Dr. Rapczynski needed to assign Mr. Von Kohorn to be a one-on-one paraprofessional with a student in Girl Doe's classroom. **See, Second Deposition of Fred Rapczynski, at 229:25—230:14; 233:13—233:20, attached as Exhibit C.** Mr. Von Kohorn was assigned to assist a specific student, and he did not have any responsibility for or contact with Girl Doe. See, Second Deposition of Fred Rapczynski, at 275:4—275:17. Mother and Father Doe approved this assignment prior to it taking place. **See, Second Deposition of Fred Rapczynski, at 230:8—230:17; 275:10—275:20, attached as Exhibit C.**

Haynes establishes the controlling standard for whether a plaintiff falls within this exception: the question is "whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." Haynes v. City of Middletown, 314 Conn. 303, 323 (2014). Given the circumstances, including the fact that Mother and Father Doe had agreed, **see Second Deposition of Fred Rapczynski, at 230:15:230:17, 275:10—275:20, attached as Exhibit C**; Girl Doe was doing well in school and her behavior had not changed, **see Second Deposition of Fred Rapczynski, at 232:19—232:21, attached as Exhibit C**; and Mr. Von Kohorn would not have any contact with Girl Doe, **see Second Deposition of Fred Rapczynski, at 230:8:-230:14; 275:10—275:17, attached as Exhibit C**; it cannot be said that the risk of harm was so serious and immediate that there was a clear and unequivocal duty to act immediately to prevent the

harm and keep Mr. Von Kohorn out of Girl Doe's classroom. Because the uncontroverted facts do not meet the Haynes standard, Girl Doe was not an identifiable victim subject to imminent harm in autumn of 2013.

c. Mother and Father Doe were not identifiable victims subject to imminent harm at any time.

Plaintiffs have not plead that Mother and Father Doe were identifiable victims subject to imminent harm. For the purposes of this motion, this issue is undisputed.

V. The Court Should Grant Summary Judgment On Mother And Father Doe's Claims For Negligent Infliction Of Emotional Distress.

Despite the plaintiffs' claim in their brief, the counts for negligent infliction of emotional distress pleaded on behalf Mother Doe and Father Doe should be construed as claims for bystander emotional distress. The crux of the claims for negligent infliction of emotional distress is that Mother and Father Doe have "suffered physical and emotional injury from knowing [they] did not seek timely evaluation and treatment of Girl Doe and allowed Girl Doe to continue to be exposed to Von Kohorn, as a result of Dr. Rapcyznski providing her inaccurate and misleading information, which in tum has caused additional injury to Girl Doe." **See, Amended Complaint, Counts Three and Five, ¶ 35.** The allegations clearly derive from the alleged harm inflicted on Girl Doe, not an injury suffered by the parents themselves. Connecticut courts recognize a distinction between primary victims of negligent infliction of emotional distress, where a direct duty of care is owed to the plaintiff; in such cases, "a plaintiff may recover for emotional distress suffered as a result of a negligent act directed toward the plaintiff and that recovery 'does not depend on proof of either an ensuing physical injury or a risk of harm from physical impact.'" Zurzola v. Danbury Hosp., No. CV020347228S, 2003 WL 23177926, at *2. Alternatively, "in some

limited circumstances a party may recover for emotional distress arising from a negligently caused injury to a third party, or so-called bystander emotional distress." Id.

> "In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants." Page v. Smith, supra, 1 App.Cas. 197. The reasons for this are obvious. If I negligently injure you in a motor vehicle accident, I am undoubtedly liable to you, but to hold me additionally liable to the numerous people who would be distressed at your injury would be excessively burdensome. This consideration provides the justification for the control mechanisms set forth in Clohessy. Clohessy's express concern is that, without such mechanisms, there would be "unlimited liability." Clohessy v. Bachelor, supra, 237 Conn. at 50, 675 A.2d 852. These control mechanisms, however, "have no place where the plaintiff is the primary victim." Page v. Smith, supra, 1 App.Cas. 197.

Janicki v. Hosp. of St. Raphael, 46 Conn. Supp. 204, 226 (Super. Ct. 1999).

> "That determination [of whether it is a claim for direct or bystander emotional distress] depends largely on the nature of the defendant's alleged negligent act and whether the plaintiffs are properly characterized as the primary or secondary victims of that act. Janicki v. Hospital of St Raphael, 46 Conn.Sup. 204, 226, 744 A .2d 963, 25 Conn. L. Rptr. 511 (1999). A primary or direct victim of an act of negligence states a cause of action by alleging sufficient facts to fall within the Montinieri standard. In contrast, the victim of a secondary or indirect negligent act must meet the stricter Clohessy test.

Zurzola v. Danbury Hosp., No. CV020347228S, 2003 WL 23177926, at *3. In that case, a mother alleged negligent infliction of emotional distress after her infant was accidentally fed breastmilk from another patient. Id. at *1. The court held interpreted her claim as one of bystander emotional distress, despite the plaintiff's brief alleging direct negligent infliction of emotional distress, because her distress arose from an act directed at her child and the danger in which the child was placed. Id. at 3. Likewise, in this case the emotional distress suffered by Mother and Father Doe arose solely from the alleged harm suffered by their daughter, Girl Doe, as a result of delay in treatment and evaluation. As such, their claim should be construed as a claim for bystander emotional distress and dismissed, as argued in the initial brief in support of defendants' motion for summary judgment.

a. The Defendant Did Not Owe A Duty Of Care To Mother And Father Doe.

Even if this Court interprets Mother and Father Doe's claims as being for direct, rather than bystander, negligent infliction of emotional distress, those counts are unsustainable. The conduct at issue is, as analyzed above, discretionary, and thus protected by governmental immunity. The is no policy or mandate dictating the manner in which Dr. Rapczynski had to communicate with parents or what information must be provided, and Counts Three and Five do not plead any exception to the doctrine of governmental immunity. Therefore, the claims of Mother Doe and Father Doe should be dismissed.

VI. Conclusion

For the reasons set forth more fully above and in the initial memorandum of law in support of the motion for summary judgment, the defendants respectfully request that the Court grant their motion for summary judgment as to all counts.

DEFENDANTS,
TOWN OF WILTON and WILTON BOARD OF EDUCATION

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CERTIFICATION

This is to certify that a copy of the foregoing Reply Brief in Support of Motion for Summary Judgment was or will immediately be mailed or delivered electronically or non-electronically on April 14, 2017 to all parties and self-represented parties of record and to all parties who have not appeared in this matter and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery.

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Mike Kennedy, Esquire
Silver, Golub & Teitell, LLP
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Stamford, CT 06901

/s/ Krista A. Winters
Thomas R. Gerarde
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EXHIBIT A

DOCKET NO.: FST-CV15-5015035-S

GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE, INDIVIDUALLY AND FATHER DOE, INDIVIDUALLY,	SUPERIOR COURT JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	
WILTON BOARD OF EDUCATION AND TOWN OF WILTON	July 7, 2016

DEPOSITION OF FRED RAPCZYNSKI

Taken before Gina M. Ruocco, LSR #516, Court Reporter and Notary Public within and for the State of Connecticut, pursuant to Notice and the Connecticut Practice Book, at Law offices of Silver Golub & Teitell, 184 Atlantic Street, Stamford, Connecticut on Thursday, July 7, 2016, commencing at 2:49 p.m.

BRANDON HUSEBY REPORTING & VIDEO
249 Pearl Street
Hartford, Connecticut 06103
(860)549-1850

A P P E A R A N C E S:

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ALSO PRESENT:

Brian Capouch

DCF?

A. Because after my -- in my conversation with the father on Friday, January 4th, he had indicated that he would like a third party opinion, and I had indicated that even though I -- at that point in time did not have any suspicion, that I would make the referral to DCF.

THE VIDEOGRAPHER: Off the record. The time is 4:13.

(Whereupon, a recess was taken.)

THE VIDEOGRAPHER: This is the beginning of the meeting number two. We're back on the record. The time is now 4:22.

Q. I think before we went off the record I was asking you why you made the report to DCF dated January 7th, 2013, and you indicated that it was because the father wanted another opinion?

A. Correct.

Q. All right. Did you ever feel you were obligated to make a report?

A. At -- at that point in time I did not feel that I had reasonable suspicion of any neglect or abuse that would warrant it, but agreed since the father wanted a third party, or in reference to a second party, to make that referral.

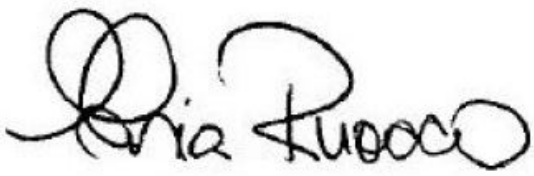
Q. And the reason you did not believe you had reasonable suspicion is you -- you believed you had determined -- you had determined that the child's report was not credible?
A. Determined that there was not opportunity, and that the child also had made some unsubstantiated claims in the past.
Q. So -- so -- and those factors, were those the only factors that led you to believe you did not have a --
A. Those were the primary factors.
Q. Let me finish my question.
Were those the only factors that led you to conclude you did not have a reasonable basis for suspicion?
A. Those are the two primary factors.
Q. Were there other factors?
A. There was no other indications that would support that there was anything inappropriate.
Q. There were no indications, is that what you said?
A. There was no other indication that something inappropriate had happened.
Q. Did you consider the girl's report to be an indication that something could have happened?

A. That was reported to me by the mother, yes.
Q. And I'm wondering whether those reports, in your view, gave you a basis to have a reasonable suspicion that perhaps there had been inappropriate touching by Von Kohorn.
A. It gave me enough suspicion to find out from my staff if there was any opportunity for that to have occurred.
Q. Did it give you enough suspicion to make a report to DCF?
A. It gave me enough to agree with the father that he wanted a third party, and that I would make the referral based upon his desire to have a third party investigate.
Q. But the parents' reports to you about what Girl Doe had reported, combined with their reports about their daughter's injuries, it's your testimony that that was not enough to cause you a sufficient degree of suspicion to make a report to DCF of suspected child abuse; is that right?
A. Correct.
Q. Okay. It did give you enough suspicion to want to do your own investigation internally, which is what you did?

A. Correct.
Q. All right. And then based on that investigation, you determined -- just looking at Exhibit 2, you determined that the information that you learned did not support the child's claims?
A. Correct.
Q. And -- and that process of investigating took place between January 3 and January 7, 2013?
A. January 3 and January 4.
Q. And it concluded on January 4?
A. It -- in a meeting with the father, he indicated his desire to have a third party, and I indicated that I would make a referral, then, to DCF.
Q. Okay. And that was something you told the father on January 4, correct?
A. Correct.
Q. And then you did eventually make the referral -- referral as you call it, but the report of suspected child abuse to DCF on January 7th, 2013, correct?
A. Correct.
Q. And did you -- did you do anything else in terms of investigating the allegations or anything else in connection with this matter in

CERTIFICATE

I, GINA M. RUOCCO, a Notary Public, duly commissioned and qualified in and for the State of Connecticut, do hereby certify that pursuant to Agreement there came before me on the 7th day of July 2016, the following named person, to wit: Fred Rapczynski, who was by me duly sworn to testify to the truth and nothing but the truth; that he was thereupon carefully examined upon his oath and his examination reduced to writing under my supervision; that this deposition is a true record of the testimony given by the witness. I further certify that I am neither attorney nor counsel for, nor related to, nor employed by any of the parties to the action in which this deposition is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in this action. In WITNESS THEREOF, I have hereunto set my hand this 21st day of July, 2016.



Gina M. Ruocco, LSR #516

Notary Public
My Commission expires:
August 31, 2017

EXHIBIT B

REPORT OF SUSPECTED CHILD ABUSE/NEGLECT

DCF-136
10/01/02 (Rev)

PLAINTIFF'S EXHIBIT 3
7-7-16 GP.
PENGAD 800-631-6989

Careline
1-800-842-2288

Within forty-eight hours of making an oral report, a mandated reporter shall submit a written report (DCF-136) to the Careline.
See the reverse side of this form for a summary of Connecticut law concerning the protection of children.

Please print or type

CHILD'S NAME: [redacted]	☐ Male ☒ Female	AGE OR BIRTH DATE: [redacted]
CHILD'S ADDRESS: [redacted]		
NAME OF PARENTS OR OTHER PERSON RESPONSIBLE FOR CHILD'S CARE: [redacted]	ADDRESS: [redacted]	PHONE NUMBER: [redacted]
WHERE IS THE CHILD STAYING PRESENTLY IF NOT AT HOME?:	PHONE NUMBER:	DATE PROBLEM(S) NOTED: 01-07-2013
NAME OF CARELINE WORKER TO WHOM ORAL REPORT WAS MADE: Pablo Chumpitazi	DATE OF ORAL REPORT: 01-08-2013	DATE AND TIME OF SUSPECTED ABUSE/NEGLECT: Unknown
NAME OF SUSPECTED PERPETRATOR, IF KNOWN: Eric Vonkohorn	ADDRESS AND/OR PHONE NUMBER, IF KNOWN: 48 Harbor Road, Southport, CT	RELATIONSHIP TO CHILD: Paraprofessional

NATURE AND EXTENT OF THE CHILD'S INJURY(IES), MALTREATMENT OR NEGLECT:

INFORMATION CONCERNING ANY PREVIOUS INJURY(IES), MALTREATMENT OR NEGLECT OF THE CHILD OR HIS/HER SIBLINGS:

LIST NAMES AND AGES OF SIBLINGS, IF KNOWN:

DESCRIBE THE CIRCUMSTANCES IN WHICH THE INJURY(IES), MALTREATMENT OR NEGLECT CAME TO BE KNOWN TO THE REPORTER:

Mrs. [redacted] stated that Mr. Eric Vonkohorn escorted [redacted] from her car, into the school building at morning drop-off when [redacted] indicated that she needed to use the bathroom. See previous report filed January 7, 2013.

WHAT ACTION, IF ANY, HAS BEEN TAKEN TO TREAT, PROVIDE SHELTER OR OTHERWISE ASSIST THE CHILD?:

I interviewed Mr. Vonkohorn. He indicated that he did escort [redacted] into the building to the bathroom. He stated that [redacted] went into the bathroom stall, while he remained outside of the stall. Mr. Vonkohorn indicated that he had told another staff member that he was taking [redacted] to the bathroom. This could not be collaborated.

REPORTER'S NAME AND AGENCY: Fred Rapczynski, Ph.D. Wilton Preschool Services	ADDRESS: 217 Wolfpit Road, Wilton, CT	PHONE NUMBER: 203-834-4909
REPORTER'S SIGNATURE: [signature]	POSITION: Director	DATE: 01-08-2013

COPY TO DCF CARELINE, 505 Hudson Street, Hartford, CT 06106

EXHIBIT C

DOCKET NO.: FST-CV15-5015035-S

GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE, INDIVIDUALLY AND FATHER DOE, INDIVIDUALLY, Plaintiffs,	SUPERIOR COURT JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	
WILTON BOARD OF EDUCATION AND TOWN OF WILTON, Defendants.	

DEPOSITION OF FRED RAPCZYNSKI

VOLUME II

DATE: August 9, 2016

TIME: 10:00 a.m.

HELD AT: Silver Golub & Teitell
184 Atlantic Street
Stamford, Connecticut 06901

By: Sarah J. Miner, LSR #238
Brandon Huseby Reporting & Video
249 Pearl Street
Hartford, Connecticut

A P P E A R A N C E S:

For the Plaintiff:

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Also Present:
Ed Giovanni

A. Protect her?
Q. Yes.
A. Yes.
Q. And that was the reason that you made -- from Girl Doe's perspective, that you directed that Von Kohorn have no continued contact with her after January 9, 2013?
MR. GERARDE: Object to the form.
THE WITNESS: It was a factor in -- in that consideration of acting in a responsible way.
BY MR. SLAGER:
Q. Okay. And the reason it was responsible, though, was because you understood if, in fact, Girl Doe truthfully reported being sexually assaulted by Von Kohorn, then continued exposure of Girl Doe to Von Kohorn would cause her additional injury?
A. Potentially, yes.
Q. And how long did you direct Von Kohorn to be kept separate from Girl Doe?
A. It was through the middle part of the next school year.
Q. Through what part of the next school year?
A. Middle part. I don't remember the specific month, but it was in the middle of the year.
Q. Okay. Sometime in the Fall of the 2013

school year?
A. Late Fall, early Winter, something like that.
Q. And at that time, did your direction about keeping Von Kohorn separate from Girl Doe change?
A. It did.
Q. Can you tell me the circumstance that led to that change?
A. The staffing needs of a preschool change on a monthly basis. I needed to shift staff around, and I contacted Mother and Father Doe and asked them if it was okay with them that I assign Eric to a classroom where their daughter was, but he would not have any direct responsibilities or interaction with their daughter.
Q. And -- and based on what the parents knew at that time of your conversation with them, they agreed?
A. They did.
Q. And had you come into any new or additional information between January 9, 2013 and the time of this conversation in the middle of the school year in the Fall of 2013 with the parents about what had happened with Von Kohorn and Girl Doe?
A. Nothing other than there was no observable behaviors or anything that was different on the part of Girl Doe.

to believe that it was less likely; is that what you are saying?

A. Yes.

Q. And -- and what factors led you to consider it less likely as time passed knowing that you did not have any additional information?

A. As I referenced, the behavior of the child was not something that escalated and that there wasn't a significant change in her behaviors.

Q. Anything else?

A. That was the primary reason.

Q. Was there any -- was there any other reason or information you had in between January 9, 2013, and the time when you made the decision to move Von Kohorn back into Girl Doe's classroom that led you to believe it was less likely that Von Kohorn had previously sexually assaulted her?

MR. GERARDE: Objection to form.

THE WITNESS: No reports from the parents of any additional behavioral concerns. No reports from the staff. Seemed to be doing well in school.

BY MR. SLAGER:

Q. Anything else?

A. Not that I can think of right now.

Q. And when was Von Kohorn returned to the

classroom in which Girl Doe -- let me withdraw the question.

When was Von Kohorn returned to Girl Doe's classroom?

MR. GERARDE: Objection to form.

THE WITNESS: I thought I mentioned, mid-year the next year.

BY MR. SLAGER:

Q. Shortly after the discussion with the parents?

A. With the parents. After I had discussed it with the parents.

Q. Okay. And at the time that -- and that decision was made by you, correct, the decision to place Von Kohorn back into Girl Doe's classroom?

MR. GERARDE: Object to the form.

THE WITNESS: It wasn't a decision to place him back. It was a decision to assign him to a student who needed his skill-set, and that student happened to be in that classroom.

BY MR. SLAGER:

Q. Okay. But you were the one who made the decision to place Von Kohorn back in the same classroom with Girl Doe, correct?

A. Yes.

the people at the St. Peter's Lutheran Preschool the statement that Von Kohorn made that he worked as both an assistant and a head teacher, correct?

A. That is correct.

Q. And you were obligated to do that?

A. As part of the process, yes.

Q. I understand you had a second conversation with Girl Doe's parents on -- I believe it was January 7, 2013 that we talked about a little bit in your last deposition, correct? That is the one where the mother informed you about the drop-off.

A. Correct.

Q. And I think you said -- and I can't remember if I am mixing this up from Dr. Smith's testimony, which was the same day, but that during -- that drop-off is a busy time at the school?

A. It is.

Q. Okay. And was one of the reasons that you thought Von Kohorn did not have -- have opportunity to be alone in the bathroom with Girl Doe is because the halls would have been busy at that time?

A. The -- yes. The -- there are two drop-offs, one for buses, one for parents. The -- it's fast and furious. The kids get dropped off and everyone is -- typically in preschool, bathroom is the first stop

when you get into the building, the staff have to take the kids to the bathrooms. So there is lots of movement and lots of traffic going to and from the bathrooms.

Q. And on the subject of opportunity, you would have expected that if Von Kohorn took Girl Doe alone into the bathroom, then other staff members would have seen that happening?

MR. GERARDE: Objection to form.

THE WITNESS: I would assume that there was a low possibility that someone could -- would be able to bring a child into the bathroom and not be seen.

BY MR. SLAGER:

Q. In other words, it would have -- you would have expected that if Von Kohorn had taken Girl Doe alone into the bathroom, another staff member would have witnessed it?

MR. GERARDE: Objection to form.

THE WITNESS: I don't know if I would make the assumption. It certainly would be a possibility that he --

BY MR. SLAGER:

Q. I am trying to understand your -- I didn't mean to interrupt you?

A. Okay.

Q. -- but I'm trying to understand your initial conclusion was that there was no opportunity.

A. Yeah.

Q. And so I am trying to understand if that was part of your mind-set, is that -- or if it was not? I am not doing it very articulately, but that's what --

A. Part of the mind-set regarding opportunity is that the bathrooms are a very busy place in preschools. And there are some designated times, but throughout the day we could have 150 bathroom trips. We had two bathrooms, and they are rarely not being used.

Q. So you would have expected, more likely than not, that if Von Kohorn took Girl Doe alone into the bathroom, another staff member would have seen that?

MR. GERARDE: Object to form.

THE WITNESS: It depends on the time of the day. Again when --

BY MR. SLAGER:

Q. At drop-off.

A. There is -- there is a period of time when the staff are out at the buses and at the cars. And as they arrive, we group the kids. So most of the staff are outside at that time. So there is a brief period of time where the majority of the staff are

outside and nobody in the actual program area. It is a brief period of time.

Q. So the morning drop-off actually would have provided an excellent opportunity for Von Kohorn to take Girl Doe alone into the bathroom? Is that what you are saying?

A. I am saying that there is a very small window where the traffic is not -- is not atypical for a preschool where there are very few people, maybe even none, in that particular area, but it is a very brief period of time.

Q. But Von Kohorn would have been aware of when that brief period of time was?

A. He would have been. And if he was making the decision to take the child, that would be a concern. But in the case that we are talking about, the mother initiated the request for him to take the girl to the bathroom --

Q. So the time --

A. -- within the building to go to the bathroom. So the time we are talking about was not his discretion. It happened to be the time that Mom asked him to do that.

Q. Okay. And we went through this last time, but I just want to make sure we are clear again. Mom

to you that anything surfaced in therapy that led them to conclude that Girl Doe had been sexually assaulted?

A. They did not.

Q. And with respect to the presence of Eric Von Kohorn in the same classroom as Girl Doe, you indicated that he was assigned to a specific student with a specific task in the same classroom as Girl Doe; is that right?

A. That is correct.

Q. And you cleared that with the parents, in other words, you cleared the -- the fact that he was going to be present on this limited assignment, focused not on their daughter but on this other student, before making that -- that change?

A. I had indicated that he would not have any responsibility or contact within the classroom with their daughter.

Q. And did they voice any objection to you making that move?

A. They did not.

MR. GERARDE: Those are my questions. Thank you very much.

MR. SLAGER: No questions. Thanks.

THE VIDEOGRAPHER: Going off the record at 1:20.

C E R T I F I C A T E

I hereby certify that I am a Notary Public, in and for the State of Connecticut, duly commissioned and qualified to administer oaths.

I further certify that the deponent named in the foregoing deposition was by me duly sworn and thereupon testified as appears in the foregoing deposition; that said deposition was taken by me stenographically in the presence of counsel and reduced to typewriting under my direction, and the foregoing is a true and accurate transcript of the testimony.

I further certify that I am neither of counsel nor related to either of the parties to said suit, nor of either counsel in said suit, nor am I interested in the outcome of said cause.

Witness my hand and seal as Notary Public the 16th day of August, 2016.

Notary Public
My Commission Expires:
November 30, 2017

EXHIBIT D

DOCKET NO.: FST-CV15-5015035-S

GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE, INDIVIDUALLY AND FATHER DOE, INDIVIDUALLY,	SUPERIOR COURT JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	
WILTON BOARD OF EDUCATION AND TOWN OF WILTON	July 7, 2016

DEPOSITION OF KEVIN SMITH, PH.D

Taken before Gina M. Ruocco, LSR #516, Court Reporter and Notary Public within and for the State of Connecticut, pursuant to Notice and the Connecticut Practice Book, at Law offices of Silver Golub & Teitell, 184 Atlantic Street, Stamford, Connecticut on Thursday, July 7, 2016, commencing at 9:30 a.m.

BRANDON HUSEBY REPORTING & VIDEO
249 Pearl Street
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(860)549-1850

A P P E A R A N C E S:

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By: THOMAS R. GERARDE, ESQ. and
KRISTA A. WINTERS, ESQ.
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ALSO PRESENT:

Brian Capouch, Videographer

going to avoid using her birth identity in order to protect her privacy, particularly in light of the sensitive nature of the allegations, okay?

A. Of course.

Q. I'm going to refer to her as Doe and I'm going to refer to her parents as Mr. and Mrs. Doe, or perhaps at times Mother and Father Doe, which is how they're listed in the complaint, okay?

A. Okay.

Q. If one of us inadvertently says the parents' name or the child's name, we have an agreement of counsel in the stipulation that the court reporter will later substitute the word Doe for that family name, okay? Is that fair enough?

A. That's fair enough.

Q. Okay, thank you.

Okay. So I do want to ask you some questions about your knowledge, and I understand that many of the events that took place that are the subject -- I'm sorry, that happened before you became superintendent of schools. But nonetheless, I want to soldier through and try to find out what you know, okay?

A. Sure.

Q. All right. Let me ask you first if you

would just tell us what your current position is in Wilton.

A. I'm currently the superintendent of schools.

Q. And who is your employer?

A. The Wilton Board of Education.

Q. Okay. How long have you had that position?

A. Since July 1st, 2014.

Q. 2014?

A. Correct, so two years.

Q. All right. And I would just ask you to keep your voice up too.

A. Oh, sure.

Q. You have a -- a video that's going to be able to pick it up because you have a microphone, but I'm not sure all of us can hear you otherwise.

A. Okay.

Q. July 1st, 2014, correct?

A. Yes.

Q. And what were you doing before that?

A. I was superintendent of schools in Bethel, Connecticut.

Q. For what period of time?

A. About two and a half years.

Q. So my question --
A. Understood, but I -- I was not superintendent in 2013 so the expectations may have been different.
Q. Maybe they were, but I would like to know what your expectations are, and I'd -- I'd like you to look at the events of early 2013 through the lens of your expectations.
A. Sure.
Q. And -- and my question is, as the superintendent of the Wilton public schools, is it your testimony that Dr. Rapczynski had the discretion to withhold the information in Exhibit 3 from the Doe parents?
MR. GERARDE: Objection to form.
A. I -- I believe it should have been shared.
Q. And is the reason it should have been shared because Dr. Rapczynski was required to share it with the parents once he learned of it?
MR. GERARDE: Objection to form.
A. That would be the expected practice.
Q. All right. And it's -- it's an expected practice that is not left to the discretion of Dr. Rapczynski, correct?

parents, you would agree that that was a significant failure on the part of the Wilton public schools?

MR. GERARDE: Objection to form.

A. I think that they should have been informed when it was learned. And like -- like I said, Fred stated that he did share that information.

MR. SLAGER: I think that's all I have for today, subject to fact that there's going to be production of a number of additional materials, including the emails that need to be redacted which are responsive to some of the other requests for production.

I understand, Tom, you wanted to ask some questions, and that's fine.

MR. GERARDE: Yeah, that's fine. I have a few follow-up questions.

EXAMINATION BY MR. GERARDE:

Q. You indicated that you began with the Wilton public school system on July 1, 2014; is that right?

A. Yes.

Q. And as of January 2013 and December 2012, you were the superintendent in the Bethel, Connecticut district; is that right?

that child abuse has occurred?

A. I believe so. I'd have to look at the exact words.

Q. With respect to the obligation to share information with parents, such as the information that Dr. Rapczynski learned on his second interview with Eric Von Kohorn, I -- I want to follow up on that. Because in response to one of the questions, you indicated that you weren't sure what the expectations were back in January 2013 because that was a year and a half before you got there; is that right?

A. Correct.

Q. And who was the superintendent before you?

A. Gary Richards.

Q. And did you ever speak to Superintendent Richards about what he would have expected someone to do in 2013 when -- in a situation like we have here?

A. No.

Q. And at one point in response to questions you said that the word required was too strong, even though in your judgment you would have probably wanted that reported right away. Does that

sound familiar?

MR. SLAGER: Objection.

A. It does. I mean, individuals make choices and come to make judgments.

Q. All right. So would it be fair to state that -- that even if you were in a position where you would exercise your discretion a particular way and make a report to a parent, would it be fair to say that it is a judgment call to be made by the individual employee under the guidance and tutelage of his superintendent at the time whether or not to report information to parents?

MR. SLAGER: Objection.

A. Can you just repeat that?

Q. Yes. Would it be fair to state that regardless of how you personally feel you would have exercised your discretion in a given situation, the decision of whether or not to disclose information to a family by a staff member would be guided by that person's discretion under the overall guidance of his or her superintendent at the time?

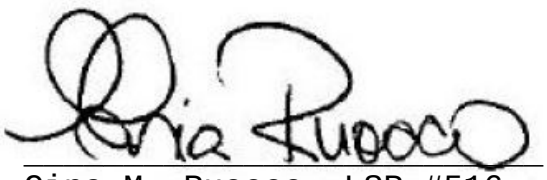
MR. SLAGER: Objection to form.

A. Yes, I think that's right.

THE VIDEOGRAPHER: We have under two minutes to go on the tape.

CERTIFICATE

I, GINA M. RUOCCO, a Notary Public, duly commissioned and qualified in and for the State of Connecticut, do hereby certify that pursuant to Agreement there came before me on the 7th day of July 2016, the following named person, to wit: Kevin Smith, Ph.D, who was by me duly sworn to testify to the truth and nothing but the truth; that he was thereupon carefully examined upon his oath and his examination reduced to writing under my supervision; that this deposition is a true record of the testimony given by the witness. I further certify that I am neither attorney nor counsel for, nor related to, nor employed by any of the parties to the action in which this deposition is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in this action. In WITNESS THEREOF, I have hereunto set my hand this 21st day of July, 2016.



Gina M. Ruocco, LSR #516

Notary Public
My Commission expires:
August 31, 2017